

R.D. # 0011-01
Paterson, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

GREAT FALLS HEALTH CARE CENTER¹

Employer

and

CASE 22-RC-12109²

**DISTRICT 1199J, NATIONAL UNION
OF HOSPITAL AND HEALTH CARE
EMPLOYEES, AFSCME, AFL-CIO³**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,⁴ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction

¹ The name of the Employer appears as amended at the hearing.

² The transcript is corrected to reflect the case number here as 22-RC-12109.

³ The name of the Petitioner appears as amended at the hearing.

⁴ Briefs filed by the Employer and the Petitioner were fully considered.

herein.⁵

3. The labor organization involved claims to represent certain employees of the Employer.⁶

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁷

All full-time and regular part-time cooks employed by the Employer at its Paterson, New Jersey facility excluding all office clerical employees, professional employees, managerial employees, registered nurses, licensed practical nurses, certified nurse assistants, dietary aides, housekeeping aides, recreational aides, rehabilitation aides, maintenance employees, social workers, guards, and supervisors as defined in the Act.

The Employer, contrary to the Petitioner, contends that the cooks are all statutory supervisors and that the unit sought by the Petitioner is inappropriate on that basis. The Petitioner currently represents the Employer's certified nurse assistants, dietary aides, housekeeping aides, recreational aides, rehabilitation aides, maintenance employees in a separate unit. There is no collective bargaining

⁵ The Employer, an unincorporated entity, is engaged in the operation of a nursing home at its Paterson, New Jersey facility, its only facility involved herein.

⁶ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁷ The unit description is in accord with the positions of the parties. There are approximately 4 employees in the unit.

agreement covering this represented unit. Further, there appears to be no history of collective bargaining for the cooks.

The record reveals that the Employer's managerial hierarchy consists of an administrator, Sherry Deichmiller, who has over-all authority for the nursing home.⁸ Reporting to the Administrator are the Director of Nurses and various department heads including Cassandra Daniels, Food Service Director. Daniels is in charge of the dietary department consisting of approximately 18 dietary aides and the 4 cooks at issue here. There appears to be no dispute that Daniels is a statutory supervisor. The dietary department operates 7 days per week on a two shift basis: 4:30 am to 1:00 pm and Noon to 7:00 pm, when the kitchen closes for the day. The record does not disclose the numbers of employees working on each shift. The Administrator testified that there are from one to three cooks on duty at any given time. The Employer asserts that the Food Service Director works a five day per week schedule and that she and the cooks on duty share the supervisory responsibility for the dietary department.⁹ The Employer contends that when the Food Service Director is not present, a cook is in charge. There is no evidence that a particular cook has any greater authority than another nor is there evidence as to what specific duties cooks assume in the Food Service Director's absence. The Employer acknowledges that the Food Service Director spends between 50 to 75% of her time in the kitchen where the dietary aides and cooks are working and that her office is located in the kitchen. It is

⁸ Deichmiller was the only witness who testified at the hearing.

⁹ The record discloses that the Food Service Director works on weekends and is off during the week. Her hours appear to be between 9:00 am and 6:00 pm.

undisputed that the Food Service Director prepares employees' work schedules and handles vacation and personal leave requests.

The Employer essentially contends that the cooks are supervisors as they direct the dietary aides in their work and discipline them when necessary. Although the Food Service Director asserted that cooks have the authority to hire, she acknowledged that such authority has not been exercised. In addition there is no probative evidence that cooks discharge, evaluate employees or promote employees. Cooks do not attend supervisory meetings. Cooks and dietary aides punch a time clock, receive the same medical benefits, receive similar vacation benefits, wear uniforms albeit different ones and have similar holiday and personal day benefits, although cooks receive fewer holidays and more personal days off which in the aggregate total the same.

Cooks are essentially responsible for assuring that meals are properly cooked and presented.¹⁰ As to work direction, the Employer asserts that cooks direct dietary aides in their work. In this connection, the Employer relies on a job description for cooks which provides that cooks "direct" dietary aides. Beyond asserting that cooks tell dietary aides what to do, there is no evidence as to the actual directions given, their character or frequency. In fact, the record does not describe what dietary aides actually do although there is a job description for them that was not introduced at the hearing. There is no evidence in this record that cooks responsibly direct other

¹⁰ A job description was introduced at the hearing delineating cooks' duties in food preparation. In addition, duties regarding direction and assignment will be discussed *infra*.

employees and in connection therewith exercise authority that is not merely routine but requires the use of independent judgment.

Regarding discipline, the record discloses no probative evidence that cooks either discipline or effectively recommend discipline of dietary aides. In this connection, the Employer's Administrator acknowledged that she had no knowledge as to whether cooks disciplined other employees. Although the Administrator testified that cooks have a reporting responsibility to advise the Food Service Director of misconduct or poor work performance which can lead to discipline, no evidence was proffered as to specific incidents or whether any have actually occurred. The Administrator acknowledged that discipline is recorded on a standard form which only the Food Service Director has used. No such disciplinary forms were introduced at the hearing.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held: "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724 citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative

history instructs the Board not to construe supervisory status too broadly because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, supra, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform those functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area-Los Angeles Express*, supra at 1073 and cases cited therein.

The burden of proving supervisory status rests on the party contending that status. *National Labor Relations Board v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001); *Midland Transportation Co.*, 304 NLRB 4 (1991); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992)(citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990)(quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). It is well established that an employee's title, standing alone, is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987).

The Employer claims that the cooks exhibit sufficient indicia of supervisory status to justify excluding them as statutory supervisors. The Employer maintains that the cooks oversee the dietary aides and can effectively recommend discipline and that they have hiring authority. The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151 (5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

There was no showing that independent judgment was required to “oversee” the dietary aides. Nor do the cooks’ alleged direction of other employees constitute “responsible direction” within the statutory sense. “Responsible direction” connotes accountability. *Providence Hospital, supra* at 727-30. There was no evidence that the cooks used independent judgment in directing other employees.

I further find that the conclusionary testimony on behalf of the Employer as to the ability of the cooks to discipline and/or hire employees is negated by the lack of evidence that the cooks have ever in fact disciplined employees, recommended employee discipline, hired employees or recommended such hire. Supervisory authority can not be found based on an alleged authority that has not in fact been exercised. *Northwest Steel*, 200 NLRB 108 (1972).

The evidence does not establish that the cooks use the independent judgment in executing supervisory tasks that is required for a finding of supervisory status under the Act. Nor is there persuasive evidence that the cooks use independent judgment in overseeing employees, or that the cooks have authority to effectively

recommend discipline or hire. As the Supreme Court recently suggested in *National Labor Relations Board v. Kentucky River Community Care*, *supra*, there can be a distinction between giving directions as to discrete tasks as opposed to directing employees generally. In this regard, I find that here, at most, cooks may direct the performance of discrete tasks rather than employees generally. Accordingly, I find that such direction, if it occurs, is not supervisory in nature. The evidence here also does not establish that the cooks have the authority to discipline or effectively discipline other employees. Although the Employer claims that cooks report misconduct and poor work performance, it appears that if this occurs it is merely a reporting function and, therefore, does not establish supervisory status. *Express Messenger Systems*, 301 NLRB 651, 653-654 (1991).

I find insufficient evidence that the cooks use independent judgment in directing employees. Nor can I conclude on the basis of this record that the cooks have authority to discipline or to recommend discipline. In the absence of any other statutory indicia, I decline to find that the cooks are statutory supervisors.¹¹

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible

¹¹ The Employer's reliance on *Sea Life, Incorporated*, 175 NLRB 982 (1969), here correctly cited, is misplaced as unlike here, the cook there scheduled hours of work, changed work schedules, assigned overtime and granted time off.

to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible

voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 5th Floor, 20 Washington Place, Newark, New Jersey 07102, on or before July 17, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by July 24, 2001.

Signed at Newark, New Jersey this 10th day of July, 2001.

Gary T. Kendellen, Regional Director
NLRB Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102